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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICKY LEE COKER, Defendant and Appellant.	F077092 (Super. Ct. No. BF169369A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Stephen D. Schuett, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Lance E. Winters, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Sarah J. Jacobs, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRING AND DISSENTING OPINION

INTRODUCTION

A jury convicted appellant Ricky Lee Coker of four crimes involving the same victim: two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1);[1] counts 1 & 2); making a criminal threat (§ 422; count 3); and intimidating a witness (§ 136.1, subd. (b)(1); count 4). The jury found true appellant used or threatened to use force in count 4 (intimidating a witness/§ 136.1, subd. (c)(1)).

In count 1 (assault with a deadly weapon), the trial court imposed an upper term of four years, which was doubled because of a prior strike. In count 4 (intimidating a witness), the court imposed a consecutive full midterm of six years. Appellant received a consecutive five-year enhancement for a prior serious felony (§ 667, subd. (a)(1)), and four consecutive one-year prior prison enhancements (§ 667.5, subd. (b)), resulting in an aggregate prison term of 23 years.[2] The court imposed various assessments and a restitution fine.

On May 20, 2020, this court filed its original opinion in this matter affirming the judgment. We agreed with the parties that appellant's prior prison enhancements (§ 667.5, subd. (b)) must be stricken. However, we rejected appellant's remaining claims. He did not suffer prejudice when the trial court prohibited a witness from testifying about the victim's "character for truthfulness." Further, we determined that remand was not required for the court to exercise its sentencing discretion for the prior serious felony enhancement (§ 667, subd. (a)(1)). Finally, appellant's constitutional rights were not violated when the court imposed the restitution fine and various assessments without conducting an ability to pay hearing. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).)

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[1] All future statutory references are to the Penal Code unless otherwise noted.

[2] In count 2 (assault with a deadly weapon) and count 3 (criminal threat) the court imposed upper terms (doubled because of the prior strike), but these sentences were stayed pursuant to section 654.

On June 4, 2020, appellant filed a petition for rehearing which raised one issue. He again asserted that remand is required for the court to exercise its sentencing discretion for the prior serious felony enhancement (§ 667, subd. (a)(1)).

On June 8, 2020, we ordered respondent to file an answer to appellant's petition for rehearing. On June 10, 2020, respondent filed its answer, taking the position that our original opinion correctly decided this issue.

On June 18, 2020, we granted appellant's petition for rehearing and we vacated our prior opinion. We now conclude it is appropriate to remand this matter for resentencing. We will direct the superior court to strike the enhancements under section 667.5, subdivision (b), and to exercise its discretion regarding the prior serious felony enhancement (§ 667, subd. (a)(1)). In all other respects, we again affirm the judgment.

BACKGROUND

Appellant did not present an affirmative defense and he does not challenge the sufficiency of the evidence. We provide a summary of the material trial evidence supporting his convictions.

I. Appellant Attacks The Victim.

On July 20, 2017, a little after midnight, appellant was with his brother, James, and James's girlfriend (the victim in this matter). In the hours leading up to these events, the three had ingested methamphetamine together at James's and the victim's residence. At about 1:00 a.m., James left to buy some food. Appellant was alone with the victim.

Appellant began to throw things at her, and he sprayed her with water from a hose. The victim believed he was joking, and she sprayed him back. Without warning, appellant struck her with his fists. He picked up a stepstool and hit her head four or five times. The victim tried to retrieve her cell phone, but appellant took it and kept it from her.

The victim felt dizzy and she sat down. Appellant approached her with a knife and stated he was going to "gut" her and cut her throat if she called the police or if the police came around. Appellant punched her with the hand holding the knife. At trial, the victim testified she was afraid for her life. She believed appellant would follow through with his threat if she had attempted to contact law enforcement.

II. The Victim Receives Help.

Following the attack, the victim was in physical pain and disoriented. She stayed in her residence for upwards of 45 minutes. She then walked to a residence where James's and appellant's other brother, Shannon, resided. Between 2:00 and 3:00 a.m., Shannon heard dogs barking and he woke up. He went outside and found the victim crying and lying on some grass. Shannon asked her what had happened. She told him appellant had "whooped my ass." Shannon and his fiancée helped the victim into their residence.

The victim had a gash on the back of her head. According to Shannon, the gash was approximately an inch and a half long, or a bit longer. According to his fiancée, the gash was about two to three inches in length. The victim also had swelling and knots on her head. Shannon estimated some knots were about half the size of his fist. Shannon and his fiancée took the victim to a hospital.

III. Both Brothers Hear Appellant Admit He Had Attacked The Victim.

At trial, both James and Shannon testified they heard appellant say he had attacked the victim. Their testimony, however, had slight differences regarding when appellant made his admission.

James testified he had not been home when appellant attacked the victim. According to James, he returned home and he looked for her. He asked appellant about her whereabouts. Appellant said he had "whooped" the victim using his hands. James repeatedly tried to contact the victim by calling her cell phone. His calls went straight to

her voicemail. At some point, however, appellant brought out the victim's phone and placed it on a table next to James.[3]

James testified he received a phone call from Shannon, which he answered on speaker. Shannon asked James if he knew the victim's location. James said he did not know where she was, and he had been trying to reach her. James learned the victim was with Shannon and his fiancée.

In slight contrast, Shannon testified he had called James prior to driving the victim to the hospital. James answered the phone on speaker. Shannon could hear appellant in the background. James did not know where the victim was located. Shannon informed him the victim was with him and her head was "split wide open." Shannon said that appellant had been responsible for the victim's injuries. According to Shannon, James yelled at appellant, asking what he had done to the victim. Shannon could hear appellant answer, "I whooped her ass." James told appellant to "get the fuck out of here." The phone call ended.

IV. The Victim Receives Staples In Her Head To Close The Gash.

Medical staff treated the victim at the hospital. During her treatment, Shannon saw that the victim had a red mark on the left inner part of her bicep. She also had red marks or blotches on her neck. Shannon testified the red blotches "looked like somebody had put a hand around [the victim's] neck or something."

According to Shannon's fiancée, who was present while the victim received medical treatment at the hospital, seven staples were used to close the gash on the victim's head.

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[3] The victim testified that, when she received her cell phone back, it had been shattered.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion Regarding Its Evidentiary Ruling And Any Presumed Error Is Harmless.

James is the victim's boyfriend. During his cross-examination, defense counsel asked him about the victim's "character for truthfulness." The trial court sustained an objection on grounds of relevance. Appellant argues the court's evidentiary ruling denied him the right to present a defense. He seeks reversal of his convictions.

A. Standard of review.

The deferential abuse of discretion standard is used to review a trial court's ruling on a relevance objection. (*People v. Jablonski* (2006) 37 Cal.4th 774, 821.) Under this standard, an appellate court will not overturn the ruling unless it was arbitrary, capricious or patently absurd, resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

B. Analysis.

The disputed evidentiary ruling occurred during James's cross-examination. Defense counsel asked him, "How would you describe [the victim's] character for truthfulness?" The prosecutor objected on relevance, which the court sustained.

A disagreement exists whether or not the trial court abused its discretion in sustaining this objection. Appellant asserts the victim's credibility was relevant because she was the only eyewitness to the attack. He contends that James (as the victim's boyfriend) was in the best position to discuss her character for truthfulness, and the court should have permitted this testimony. He maintains this was a close case, and the court's evidentiary ruling was prejudicial. He argues *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) should be used to evaluate prejudice. In the alternative, he maintains he suffered prejudice under any standard.

In contrast, respondent asserts an abuse of discretion did not occur. In any event, respondent contends any presumed error was harmless. According to respondent, the

appropriate standard of review is under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). Respondent argues it is not reasonably probable appellant would have received a more favorable verdict in the absence of the trial court's alleged error.

We need not address all of the parties' contentions. Although a dispute exists regarding whether the trial court abused its discretion, we need not resolve that issue. Instead, we agree with respondent that any presumed error is harmless. As such, we proceed directly to analyzing prejudice.

Appellant is incorrect that *Chapman* is the correct standard of prejudicial review. To the contrary, a trial court's discretionary evidentiary ruling does not infringe impermissibly on a criminal defendant's constitutional right to present a defense. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611 (*Cudjo*); *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) In this situation we review prejudice under *Watson*. (*Cudjo*, *supra*, 6 Cal.4th at p. 611.) Under this standard, the presumed error is harmless if it is not reasonably probable the verdicts were impacted. (*Ibid.*)

Based on this record, it is clear the alleged error was harmless. The trial evidence overwhelmingly corroborated the victim's testimony. Appellant admitted he had attacked her. Both of his brothers heard him state he had "whooped" her. The victim suffered significant injuries. She had a gash on the back of her head that required seven staples to close. She had multiple knots on her head. Shannon estimated some of the knots were about half the size of his fist. The victim's injuries were consistent with her description of appellant's attack and her claim appellant used a stool as a weapon.[4] Further, after James returned home, appellant gave the victim's phone to James. This

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[4] Appellant asserts he did not use a stool to harm the victim. He notes he only admitted using his hands when he disclosed to James what had happened. According to appellant, the victim should have had greater injuries (such as a longer gash on her head) if he had used a stool. He also contends no physical evidence on the stool was presented at trial, such as denting or blood. These assertions are unpersuasive. The evidence strongly suggests appellant used more than his fists to injure the victim.

further corroborates the victim's testimony that appellant took her cell phone from her and threatened she could not call law enforcement.

The evidence against appellant was extremely strong. Based on appellant's admissions and the nature of the victim's injuries, it is not reasonably probable appellant would have received a more favorable outcome had James been permitted to testify about the victim's character for truthfulness.[5] Consequently, the trial court's presumed evidentiary error is harmless and no basis for reversal appears. (See *Cudjo*, *supra*, 6 Cal.4th at p. 614.) Accordingly, this claim fails due to a lack of prejudice.

II. Appellant's Four Prior Prison Enhancements Must Be Stricken.

We agree with the parties that all four of appellant's prior prison enhancements (§ 667.5, subd. (b)) must be stricken.

In October 2019, the Governor signed into law Senate Bill No. 136 (2019–2020 Reg. Sess.) (Senate Bill 136). (*People v. Lopez* (2019) 42 Cal.App.5th 337, 340.) This amended section 667.5, subdivision (b), which deals with prior prison enhancements. Following the amendment, prior prison enhancements only occur if the prior prison term was for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). (*People v. Lopez*, *supra*, 42 Cal.App.5th at pp. 340–341.)

The parties agree none of appellant's four prior prison terms were for sexually violent offenses.[6] The parties also agree this amendment applies retroactively to appellant because his case is not yet final. We agree, and we will direct the trial court to strike the four enhancements under section 667.5, subdivision (b).[7]

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[5] We likewise find unpersuasive appellant's speculative assertion his trial counsel must have known James would testify the victim was a liar.

[6] The information had alleged five prior prison enhancements under section 667.5, subdivision (b). In a bifurcated proceeding, the trial court found true all five allegations. However, the court later struck one prior prison term because it no longer qualified as a felony.

[7] Prior to filing supplemental briefing regarding the impact of Senate Bill 136, the parties had agreed appellant's four prior prison terms should be stricken based on the

III. We Remand This Matter For The Trial Court To Exercise Its Discretion Regarding The Prior Serious Felony Enhancement.

Appellant committed the present offenses in 2017 and he was sentenced in February 2018. When sentenced in this matter, the court did not have authority to strike his prior serious felony enhancement found true under section 667, subdivision (a)(1). (See *People v. Jones* (2019) 32 Cal.App.5th 267, 272.)

Appellant asserts a remand is required in light of Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill 1393). This legislation amended sections 667 and 1385 to provide trial courts with discretion to strike five-year sentencing enhancements (§ 667, subd. (a)(1)) based on prior serious felony convictions. (*People v. Kelly* (2019) 32 Cal.App.5th 1013, 1015–1016.) In his petition for rehearing, appellant relies upon this court's opinion in *People v. Bell* (2020) 47 Cal.App.5th 153 (*Bell*).

Respondent concedes that this amendment applies retroactively to appellant. Respondent, however, asserts that remand for this issue is not warranted. The trial court imposed the maximum possible sentence against appellant. In doing so, the court denied a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to strike a prior strike conviction. Based on the sentencing record, respondent contends that the court clearly indicated it would not have exercised its discretion favorably for appellant. Respondent asserts that *Bell, supra,* 47 Cal.App.5th 153, does not compel reconsideration of our prior opinion.

In our original opinion, we agreed with respondent that, based on the trial court's sentencing choices, remand was not warranted for this issue. However, we have revisited that position. Although the sentencing record suggests that the court would not have exercised its discretion favorably for appellant, we will remand this matter in an abundance of caution. (See § 1260 [proceedings may be remanded as are just under the

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washout provision contained in section 667.5, subdivision (b). Because of Senate Bill 136, however, we need not further address this alternative ground for relief.

circumstances].) We further agree with the parties that, when exercising its discretion, it is appropriate for the court to consider appellant's conduct in custody after the original sentencing hearing. (See *People v. Warren* (1986) 179 Cal.App.3d 676, 687.) We express no opinion regarding how the court should exercise its sentencing discretion.

IV. *Dueñas* Is Distinguishable From The Present Matter And The Trial Court Did Not Violate Appellant's Constitutional Rights.

At sentencing, the trial court imposed a minimum $300 restitution fine (§ 1202.4, subd. (b)(1)). The court also imposed a court operations assessment of $160 (§ 1465.8, subd. (a)(1)) and a criminal conviction assessment of $120 (Gov. Code, § 70373, subd. (a)(1)) (the assessments).[8] The court did not determine appellant's ability to pay these amounts prior to their imposition.[9]

In supplemental briefing, appellant contends the trial court violated his various constitutional rights when it imposed the restitution fine and the assessments without conducting an ability to pay hearing. His claim is based on *Dueñas*, *supra*, 30 Cal.App.5th 1157. He asks this court to strike the assessments and restitution fine, and remand for a hearing on his ability to pay them.

Much has been written about *Dueñas* in the past year, both from this court and around the state. (See *People v. Lowery*, *supra*, 43 Cal.App.5th 1046, 1052–1053 (*Lowery*); *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1063–1065 (*Aviles*).) We find

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[8] "A restitution fine (§ 1202.4, subd. (b)(1)) represents punishment. [Citation.] In contrast, a court operations assessment (§ 1465.8, subd. (a)(1)) and a criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)) are not considered punishment. [Citations.]" (*People v. Lowery* (2020) 43 Cal.App.5th 1046, 1048, fn. 3.)

[9] According to the probation report, appellant was born in 1961. His health is listed as poor. He suffers from "colitis, prostate problems, kidney stones, severe migraines, hyperthyroidism and two crushed discs in his back." He takes various medications and he has been on social security disability since 2016. From 2010 to 2015, he worked as a solar installer. He also worked for four years (at an unknown period of time) for an oil drilling company. Appellant earns about $878 per month on disability. He has no listed assets.

appellant's assertions unpersuasive. *Dueñas* is distinguishable from the present matter, and appellant's constitutional rights were not violated.[10]

A. *Dueñas* is distinguishable from the present matter and it does not establish a violation of appellant's constitutional rights.

The defendant in *Dueñas* lost her driver's license because she was too poor to pay juvenile citations. (*Dueñas, supra*, 30 Cal.App.5th at p. 1161.) She continued to offend because aggregating criminal conviction assessments and fines prevented her from recovering her license. (*Ibid.*) The *Dueñas* court described this as "cascading consequences" stemming from "a series of criminal proceedings driven by, and contributing to, [the defendant's] poverty." (*Dueñas, supra*, 30 Cal.App.5th at pp. 1163–1164.) The *Dueñas* court concluded the defendant faced ongoing unintended punitive consequences because of the imposed financial obligations. *Dueñas* determined those unintended consequences were "fundamentally unfair" for an indigent defendant under principles of due process.[11] (*Id.* at p. 1168.)

This court has declined to expand *Dueñas*'s holding beyond the unique facts found in *Dueñas*. In *Lowery*, two defendants were convicted for a series of armed robberies, and various fees, fines and assessments were imposed against them. (*Lowery, supra*, 43 Cal.App.5th at pp. 1048–1049.) Based on *Dueñas*, the defendants in *Lowery* challenged the imposition of some of those financial obligations. The *Lowery* court, however, rejected a due process challenge based on *Dueñas*. The *Lowery* court noted the "unique

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[10] Respondent asserts this claim is forfeited because appellant failed to object at sentencing. Because appellant's claim fails on its merits, we need not address the parties' arguments regarding forfeiture.

[11] The *Dueñas* court noted the imposed financial obligations were also potentially unconstitutional under the excessive fines clause of the Eighth Amendment to the United States Constitution. However, *Dueñas* stated "[t]he due process and excessive fines analyses are sufficiently similar that the California Supreme Court has observed that '[i]t makes no difference whether we examine the issue as an excessive fine or a violation of due process.' [Citation.]" (*Dueñas, supra*, 30 Cal.App.5th at p. 1171, fn. 8.)

concerns addressed in *Dueñas*" were lacking. (*Lowery*, *supra*, at p. 1056.) Nothing established or even reasonably suggested the two defendants in *Lowery* faced ongoing unintended punitive consequences stemming from the imposition of fees, fines and assessments. The defendants did not establish how they suffered a violation of a fundamental liberty interest. To the contrary, the defendants had been incarcerated not because of their alleged indigency but because they were convicted of intentional criminal acts. Because unintended consequences were not present, the *Lowery* court held it was not fundamentally unfair for the trial court to impose fees, fines and assessments against the defendants without first determining their ability to pay. (*Lowery*, *supra*, at pp. 1056–1057.)

As in *Lowery*, the unique concerns addressed in *Dueñas* are lacking here. Appellant does not establish the violation of a fundamental liberty interest. His incarceration was not a consequence of prior criminal assessments and fines. He was not deprived of liberty because of his indigency. He was not caught in a cycle of "cascading consequences" stemming from "a series of criminal proceedings driven by, and contributing to, [his] poverty." (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1163–1164.) He could have avoided the present convictions regardless of his financial circumstances. *Dueñas* is distinguishable and it has no application in this matter. (*Lowery*, *supra*, 43 Cal.App.5th at pp. 1054–1055.) In short, it was not fundamentally unfair for the trial court to impose the restitution fine and the assessments in this matter without first determining appellant's ability to pay. Therefore, we reject appellant's constitutional challenges. (See *Lowery*, *supra*, 43 Cal.App.5th at pp. 1056–1057.)

B. Appellant's Eighth Amendment Challenge Is Without Merit.

Apart from *Dueñas*, appellant raises an excessive fines challenge.[12] This assertion is without merit.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334 (*Bajakajian*).) The following factors are examined to determine if a fine is constitutionally excessive: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. (*Aviles*, *supra*, 39 Cal.App.5th at p. 1070.) While ability to pay may be part of the proportionality analysis, it is not the only factor. (*Bajakajian*, *supra*, 524 U.S. at pp. 337–338.) We must give deference to the Legislature's determination regarding the appropriate punishment. (*Id.* at p. 336.)

In the present matter, appellant was convicted of two counts of assault with a deadly weapon (§ 245, subd. (a)(1); counts 1 & 2); making a criminal threat (§ 422; count 3); and intimidating a witness (§ 136.1, subd. (b)(1); count 4). In count 4 (intimidating a witness), the jury found true appellant used or threatened to use force (§ 136.1, subd. (c)(1)). When the relevant factors are examined, it is abundantly clear the minimum $300 restitution fine and the total assessments of $280 are not "grossly disproportional" when compared to his crimes. (*Bajakajian*, *supra*, 524 U.S. at p. 334.) As such, we reject appellant's assertions the excessive fines clause of the Eighth Amendment was violated. (See *Lowery*, *supra*, 43 Cal.App.5th at p. 1058; *Aviles*, *supra*, 39 Cal.App.5th at p. 1072.)

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12 The United States Supreme Court recently held the Excessive Fines Clause is incorporated to the States through the Due Process Clause of the Fourteenth Amendment. (*Timbs v. Indiana* (2019) ___U.S.___ [139 S.Ct. 682, 687].)

DISPOSITION

Appellant's sentence is vacated and this matter is remanded for resentencing. The trial court shall strike the enhancements imposed under Penal Code section 667.5, subdivision (b). During resentencing, the court shall exercise its discretion under Senate Bill 1393 regarding the five-year enhancement under Penal Code section 667, subdivision (b). In exercising this discretion, the court shall take into consideration appellant's conduct in custody after the original sentencing hearing. Following resentencing, the court shall forward a new abstract of judgment to the appropriate authorities. In all other respects, appellant's judgment is affirmed.

LEVY, Acting P.J.

I CONCUR:

FRANSON, J.

MEEHAN, J., Concurring and Dissenting.

The majority rejects appellant's ability-to-pay challenge to the restitution fine and court assessments imposed by the trial court based on inability to pay, advanced in reliance on the Court of Appeal's decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). The majority does not reach the issue of forfeiture and concludes that appellant fails to show a violation of either the due process clause or the excessive fines clause. As explained herein, I respectfully dissent from the majority's conclusions on this issue. I otherwise concur.

In this case, the trial court imposed the statutory minimum restitution fine under Penal Code section 1202.4, subdivision (b)(1), and, as a result, appellant was expressly precluded under section 1202.4, subdivision (c), from challenging the fine based on his inability to pay.[1] In addition, *Dueñas*, which was decided during the pendency of this appeal, marked a significant shift in the law. Finally, the record in this case is understandably silent regarding appellant's ability to pay. Given these factors, I would reject respondent's forfeiture argument and remand the matter to the trial court for the limited purpose of allowing appellant to raise the issue and make an appropriate record.

I. Split of Authority

Presently, Courts of Appeal are split regarding if, and under what circumstances, the forfeiture doctrine applies to a claim brought under *Dueñas*. (E.g., *People v. Son* (2020) 49 Cal.App.5th 565, 596–597 [rejecting forfeiture argument as to minimum restitution fine and court assessments] (*Son*); *People v. Taylor* (2019) 43 Cal.App.5th 390, 399–401 [challenge to restitution fine forfeited where fine above the statutory minimum and the defendant failed to exercise his statutory right to object, but challenge to court fees not forfeited because *Dueñas* was unforeseeable]; *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 197, 206 [applying forfeiture doctrine to statutory minimum

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[1] All further statutory references are to the Penal Code unless otherwise noted.

restitution fine and court fees]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1154 [applying forfeiture doctrine to restitution fine and court assessments where the defendant had statutory right to object to imposition of restitution fine above statutory minimum and failed to do so] (*Frandsen*).)

Courts of Appeal are also split regarding if and under what circumstances the constitutional concerns underpinning *Dueñas* apply. (E.g., *Son, supra*, 49 Cal.App.5th at pp. 592–596 & fn. 20 [restitution fines are punitive and imposition without ability-to-pay hearing does not implicate right of access to courts or violate substantive due process or equal protection rights, but limited remand appropriate to allow the defendant an opportunity to show inability to pay court assessments and to raise 8th Amend. excessive fines clause argument regarding restitution fine];[2] *People v. Cowan* (2020) 47 Cal.App.5th 32, 42–49, review granted June 17, 2020, S261952 [concluding challenge to fines and fees should be analyzed under excessive fines clause of federal and state constitutions, under which ability to pay is a factor, and remanding matter for ability-to-pay hearing] (*Cowan*); *People v. Lowery* (2020) 43 Cal.App.5th 1046, 1053–1061) [finding *Dueñas* claim forfeited as to restitution fine, assessments and fees where court imposed restitution fine above the statutory minimum, but also concluding *Dueñas* factually distinguishable; the defendants failed to show a violation under due process, equal protection or excessive fines clause; and any error harmless given ability to earn wages in prison]; *People v. Belloso* (2019) 42 Cal.App.5th 647, 662–663, review granted Mar. 11, 2020, S259755 [following *Dueñas*] (*Belloso*); *People v. Allen* (2019) 41

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[2] Justice Smith's analysis of the defendant's *Dueñas*-based challenge to the imposition of the fines and court assessments did not command a majority. (*Son*, *supra*, 49 Cal.App.5th at pp. 598–604.) Justice Snauffer concurred in the disposition, but did not join in or express an opinion on whether, in all cases, restitution fines are punitive in nature and not subject to an ability-to-pay challenge. (*Id.* at pp. 598–599 (conc. opn. of Snauffer, J.).) Justice Franson dissented on the grounds that the defendant's constitutional rights were not violated and any error was harmless. (*Id.* at p. 599 (dis. opn. of Franson, J.).)

Cal.App.5th 312, 325–330 [rejecting the defendant's *Dueñas*-based due process and equal protection claims]; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326–329, review granted Nov. 26, 2019, S258946 [rejecting *Dueñas*'s due process analysis] (*Hicks*); *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1061 [disagreeing with *Dueñas*'s due process analysis and concluding constitutional challenge to fines, fees and assessments should be made under the 8th Amend.'s excessive fines clause]; *People v. Kopp* (2019) 38 Cal.App.5th 47, 95–96, review granted Nov. 13, 2019, S257844 [following *Dueñas* as to assessments, but not restitution fines] (*Kopp*); *People v. Castellano* (2019) 33 Cal.App.5th 485, 489–490 [extending *Dueñas* holding to claim raised by a defendant serving a sentence following felony conviction] (*Castellano*).)

The California Supreme Court is now poised to address issues raised by *Dueñas*, having granted review in *Kopp*, a case in which the Court of Appeal found that as to assessments, the defendants were entitled to remand for an ability-to-pay hearing under *Dueñas*, but they bore the burden of demonstrating their inability to pay. (*Kopp*, *supra*, 38 Cal.App.5th at pp. 95–96, review granted.) With respect to fines, the *Kopp* court declined to follow *Dueñas*'s due process approach and concluded that a constitutional challenge to a punitive fine must be raised under the excessive fines clause of the Eighth Amendment of the federal Constitution and article I, section 17 of the California Constitution. (*Kopp*, *supra*, at pp. 96–98, review granted.) The California Supreme Court limited review in *Kopp* to whether courts must consider a defendant's ability to pay in imposing fines, fees and assessments; and, if so, which party bears the burden of proof. The court has deferred briefing in *Cowan*, *Belloso* and *Hicks* pending its decision in *Kopp*.

II. Forfeiture

Turning to the issues presented here, the failure to object in the trial court generally forfeits a claim on appeal and this principle is applicable to constitutional claims. (*People v. McCullough* (2013) 56 Cal.4th 589, 593; *In re Sheena K.* (2007) 40

Cal.4th 875, 880–881; see § 1259.) There are exceptions to this general rule, however, and courts of review have the discretion to consider an issue notwithstanding the failure to object. (*People v. McCullough*, *supra*, at p. 593; *In re Sheena K.*, *supra*, at p. 887, fn.7.) In this case, the parties disagree over whether appellant forfeited his *Dueñas* claim by failing to object to the restitution fine and court assessments imposed by the trial court. The majority does not reach this issue, but I would resolve it because in my view, it informs the disposition.

A. Cases Applying Forfeiture Doctrine to Imposition of Restitution Fines Above Statutory Minimum

It was unnecessary for the court in *Dueñas* to address the issue of forfeiture because the trial court held an ability-to-pay hearing following *Dueñas*'s objection and request for a hearing, but post-*Dueñas*, several cases have applied the forfeiture doctrine where the trial court imposed a restitution fine above the statutory minimum.[3] (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032–1033 (*Gutierrez*); *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 (*Bipialaka*); *Frandsen*, *supra*, 33 Cal.App.5th at pp. 1153–1154.)

The restitution statute provides that the inability to pay is not a "compelling and extraordinary reason not to impose a restitution fine[]" (§ 1202.4, subd. (c)), but where, as in *Gutierrez*, *Bipialaka* and *Frandsen*, a trial court imposes a restitution fine above the statutory minimum, the court may consider the defendant's inability to pay in setting the fine (§ 1202.4, subd. (d)). Because the defendants in such cases could have but did not object to the imposition of a restitution fine above the statutory minimum, the Courts of Appeal concluded they forfeited their claims. *Gutierrez* and *Frandsen* also reasoned by extension that given the absence of any objection over the imposition of a restitution fine

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3 In *People v. Rodriguez*, the Court of Appeal applied the forfeiture doctrine to a minimum restitution fine, but it did so without discussion. (*People v. Rodriguez*, *supra*, 40 Cal.App.5th at pp. 197, 206.)

in the maximum amount of $10,000, there would have been no basis to object to the imposition of fees or assessments in a substantially lesser amount. (*Gutierrez, supra*, 35 Cal.App.5th at p. 1033; *Frandsen, supra*, 33 Cal.App.5th at p. 1154.) In this case, the trial court imposed the minimum restitution fine, which, under the plain language of the statute, was not objectionable based on inability to pay (§ 1202.4, subd. (c)) and, therefore, the reasoning of *Gutierrez* and *Frandsen* does not apply.

B. Failure to Object Excused Where Futile or Unsupported Under Existing Law

"Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237; accord, *People v. Gomez* (2018) 6 Cal.5th 243, 286–287; *People v. Black* (2007) 41 Cal.4th 799, 810.) Appellant argues, in relevant part, that the futility exception of the forfeiture doctrine is applicable here. I agree.

In cases such as this, involving the imposition of the statutory minimum restitution fine and mandatory court assessments, the decision in *Dueñas* constituted a marked departure from existing law. As recognized by the Court of Appeal in *Castellano*, "[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay[; and] none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay." (*Castellano, supra,* 33 Cal.App.5th at p. 489.) The Court of Appeal in *People v. Johnson* (2019) 35 Cal.App.5th 134, 138, agreed, explaining, "Granted, *Dueñas* is grounded in longstanding due process principles and precedent (see *Dueñas, supra,* 30 Cal.App.5th at pp. 1168–1169, 1171 [relying on *Griffin v. Illinois* (1956) 351 U.S. 12, *In re Antazo* (1970) 3 Cal.3d 100, and *Bearden v. Georgia* (1983) 461 U.S. 660]), but the statutes at issue here stood and were routinely applied for so many years without successful challenge (see *Dueñas, supra*, 30

Cal.App.5th at p. 1172, fn. 10), that we are hard pressed to say its holding was predictable and should have been anticipated." (Fn. omitted.)

Another Court of Appeal subsequently adopted this view, pointing out that in addition to the statutory language that "all but precluded" a meaningful opportunity to contest the restitution fine and "all but foreclosed" a due process challenge to the fee assessments (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1032 (*Jones*), "controlling case law on point effectively foreclosed any objection that imposing the $300 restitution fine without conducting an ability to pay hearing violated his due process rights" (*id.* at p. 1031, citing *People v. Long* (1985) 164 Cal.App.3d 820, 826, 828 (*Long*)). Indeed, in *Long*, this court rejected a due process challenge based on the defendant's inability to pay, stating, "[C]onsideration of a defendant's inability to pay a [restitution] fine is clearly not a prerequisite to the imposition of the fine."[4] (*Long, supra,* at p. 828.) The *Long* court concluded that imposition of the restitution fine was not constitutionally infirm because the defendant would "suffer no further incarceration based on [his] inability to pay," the only detriment being "possible execution against whatever nonexempt assets he may have to satisfy his delinquent indebtedness to the state." (*Ibid.*) The decision in *Long* was thereafter followed in rejecting similar challenges based on inability to pay. (*People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1549, 1550 [applying reasoning in *Long* to reject ability-to-pay challenge to direct victim restitution order, but concluding the defendant was deprived of a reasonable opportunity to be heard on the

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4 In *Dueñas*, the court stated, "To the extent that … *Long*[, *supra*,] 164 Cal.App.3d 820 remains viable despite its reliance on multiple statutes that have since been amended, we respectfully disagree with its due process analysis." (*Dueñas, supra*, 30 Cal.App.5th at p. 1172, fn. 10.) In *Jones*, however, the court observed, "At bottom, *Dueñas* simply disagreed with *Long*'s due process analysis. [Citation.] While *Dueñas* noted that *Long* interpreted statutes that were subsequently amended [citation], we do not see the fact of amendments as having been decisive in *Dueñas*, nor changes that foretold that decision. The amendments did not change the relevant bases for the fines." (*Jones, supra*, 36 Cal.App.5th at pp. 1031–1032.)

restitution issue, where the trial court "unexpected[ly]" imposed restitution in an amount and under terms that differed from that recommended in the probation report]; *People v. McGhee* (1988) 197 Cal.App.3d 710, 715 [rejecting excessiveness challenge to $10,000 restitution fine and stating alleged lack of assets and limited employment not relevant].)

The *Jones* court found that "it was reasonable for [the defendant] to conclude at the time of his sentencing that he could not meaningfully raise the objection that ultimately prevailed in *Dueñas*. As our Supreme Court has explained, '[t]he circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to anticipate[]' the change in law." (*Jones, supra,* 36 Cal.App.5th at p. 1034, quoting *People v. Black, supra,* 41 Cal.4th at p. 812; accord, *People v. Perez* (2020) 9 Cal.5th 1, 8.) The court rejected the *Frandsen* court's assertion that "*Dueñas* was foreseeable [because] *Dueñas* herself foresaw it" and that it applied old law. (*Frandsen*, *supra*, 33 Cal.App.5th at p. 1154.) The *Jones* court stated, "[W]e will not characterize *Dueñas* as foreseeable simply because it cited principles stretching back to the Magna Carta." (*Jones, supra*, at p. 1034.) "[T]he fact that a new case relies on long-held principles or other established law does not necessarily mean it was foreseeable." (*Ibid.*, citing *People v. Black, supra,* at pp. 810–812; accord, *People v. Perez*, *supra*, at pp. 9–10.)

As this case involves a restitution fine in the minimum amount, which appellant was precluded from challenging based on inability to pay by the statute's express terms, I would follow the aforementioned authorities and find that given the statutory language and the state of the substantive law pre-*Dueñas,* appellant did not forfeit his *Dueñas* claim by failing to object in the trial court.

III. Remand Appropriate on This Record

Respondent does not argue in this case that *Dueñas* was wrongly decided. Respondent concedes that "*Dueñas* addresses important constitutional concerns that may arise when the criminal justice system imposes penal consequences on a defendant for his

or her inability to pay court-ordered assessments and fines[,]" and "[t]he criminal justice system should not be blind to the consequences that monetary assessments may have for indigent defendants, and constitutional concerns may arise due to their lack of wealth." Given that the parties did not have the benefit of *Dueñas* at the time of sentencing and appellant did not forfeit his claim, I would accept respondent's concession on this point and allow appellant to raise the issue in the trial court on remand, where he will bear the burden of both demonstrating a harm of constitutional magnitude and making a record regarding his alleged inability to pay the fines, fees and assessments. I express no view as to whether appellant may be able to state a viable claim that ultimately withstands constitutional scrutiny on review.

The *Dueñas* case included a detailed record regarding the legal proceedings that began when the defendant was a teenager and culminated in the situation confronted by the Court of Appeal. *Dueñas* is therefore distinguishable on the issue of burden. Subsequently, in *Castellano,* the appellate court clarified that the holding in *Dueñas* was informed by its facts: "Our holding … that the fees and assessments could not constitutionally be assessed and that execution of the restitution fine had to be stayed was based on the trial court's uncontested finding that Dueñas was unable to pay the amounts imposed." (*Castellano, supra,* 33 Cal.App.5th at p. 490.)

Castellano explained, "Consistent with *Dueñas,* a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1168–1169.) The trial court then must consider all relevant factors in determining whether the defendant is able to pay the fines, fees and assessments to be imposed. Those factors may include, but are not limited

to, potential prison pay during the period of incarceration to be served by the defendant. If the trial court determines a defendant is unable to pay, the fees and assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant's ability to pay has been restored. (*Dueñas*, at pp. 1168–1169, 1172.)" (*Castellano*, *supra*, 33 Cal.App.5th at p. 490, fn. omitted; accord, *Belloso*, *supra*, 42 Cal.App.5th at pp. 662–663, review granted.)

With respect to the imposition of fees, *Dueñas* referred to a defendant's "*present* ability to pay." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164, italics added.) I reiterate that *Dueñas* involved a detailed record regarding the defendant's economic situation: she and her husband were homeless and had two children they were unable to support fully on the government assistance received, her husband was unemployed other than occasional short-term construction work, and she had dropped out of high school and was unemployed as a result of a disability. (*Id.* at pp. 1160–1161.) Moreover, the trial court already determined that the defendant was unable to pay. Thus, the "present ability" language in *Dueñas* should not be divorced from the facts. (*Id.* at p. 1164.) Indeed, *Castellano* subsequently rejected the defendant's argument that the People had to prove his present ability to pay and in addition to clarifying that the burden of presenting evidence of inability to pay lies in the first instance with the defendant, the court included in its discussion of relevant factors for the trial court to consider "potential prison pay during the period of incarceration to be served by the defendant." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490, fn. omitted; accord, *People v. Santos* (2019) 38 Cal.App.5th 923, 934; *Kopp*, *supra*, 38 Cal.App.5th at p. 96, review granted.)

The United States Supreme Court has recognized that "[t]he State … has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way *immunizes* him from punishment." (*Bearden v. Georgia*, *supra*, 461 U.S. at p. 669, italics added; see *People v. Lewis* (2009) 46 Cal.4th 1255, 1321 ["[The] defendant's assertion that he was unable to pay the fine

did not compel the court to impose a lesser fine."].) Discretion to determine an appropriate fine amount rests with the trial court and the court is free to consider, among other factors, any money received by a defendant, be it in the form of prison wages or gifts. (*People v. Potts* (2019) 6 Cal.5th 1012, 1055–1056 [concluding trial court could lawfully impose $10,000 restitution fine despite condemned inmate's categorical ineligibility to earn prison wages and his receipt of only occasional small gifts of money from family, and rejecting argument "that a fine is automatically invalid if a defendant is unable to pay it"].)

In reaching a contrary conclusion, the majority takes the position that *Dueñas* is limited to its facts, that appellant has not established the violation of a fundamental liberty interest and that appellant's excessive fines challenge lacks merit. I agree with the majority that the facts of *Dueñas* are distinguishable, but that does not resolve the matter. *Castellano* extended *Dueñas* beyond its unique facts and found that a limited remand was appropriate where, as here, the defendant's claim was based on a newly announced constitutional principle and he did not forfeit the claim because he lacked the ability under the statute to object to the minimum restitution fine. (*Castellano, supra,* 33 Cal.App.5th at pp. 487, 489.) Recently, the Court of Appeal in *Cowan*, decided on excessive fines grounds, also concluded that remand was appropriate to allow the defendant to make a record regarding ability to pay. (*Cowan, supra,* 47 Cal.App.5th at pp. 48–49, review granted.)

As I have explained, respondent does not challenge the constitutional underpinnings of *Dueñas*, appellant did not forfeit his claim and the parties here did not have the benefit of *Dueñas* at the time of sentencing. Given these considerations, I would remand this matter to allow appellant to raise the issue in the trial court, where he will bear the burden of both demonstrating a harm of constitutional magnitude and making a record regarding his alleged inability to pay the fines and fees. As discussed, there is a split of authority as to the applicability of various constitutional principles and theories to

the issue of ability to pay fines, fees and assessments, and the issue is pending before our Supreme Court. I take no position as to the merits of whether the ability to pay minimum fines or mandatory fees and assessments may warrant constitutional protection in this case because it is premature to do so given its posture. My position is simply that where, as here, a defendant advances a claim premised on a significant and unforeseeable development in the law that occurred after sentencing and during the pendency of the appeal; there was no statutory right to object to the fines, fees and assessments at issue; and the record is wholly undeveloped on the issue, a limited remand is appropriate to allow the parties to address the issue in the trial court in the first instance.

IV. Harmlessness of Error

Finally, respondent argues that because appellant is serving a lengthy prison term and there is no indication he is unable to perform prison work, he presumably has the ability to satisfy his debt through prison wages and future earnings. (See §§ 2700, 2801.) I agree there is ample authority supporting the proposition that prisoners are able to pay a restitution fine out of future prison wages (*People v. Santos*, *supra*, 38 Cal.App.5th at p. 934; *Kopp*, *supra*, 38 Cal.App.5th at p. 96, review granted; *Jones*, *supra*, 36 Cal.App.5th at p. 1035; *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376–1377; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487), or small gifts from friends or family (*People v. Potts*, *supra*, 6 Cal.5th at pp. 1055–1056), but I believe that because the record is undeveloped, reliance on either proposition is purely speculative at this juncture (see *Cowan*, *supra*, 47 Cal.App.5th at p. 49, review granted ["evaluation of ability to pay must include future ability to pay"]). Not all inmates are able to work and not all inmates who work are eligible for paid positions, which are considered a privilege and are accompanied by various restrictions and requirements. (Cal. Code Regs., tit. 15, §§ 3040, 3041.1.) Furthermore, not all inmates receive monetary gifts from friends or family. Therefore, I would remand the matter to allow the parties and the trial court to make a record on these issues.

Based on the foregoing, I respectfully dissent from the majority's conclusions in part IV. of the Discussion.

MEEHAN, J.